

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

76-2153

To Be Argued By:

GAGE ANDRETTA

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-2153

KHALIEB MCKINNON, LAURENCE MINCY, DAVID WHEELER,

Plaintiffs-Appellants,

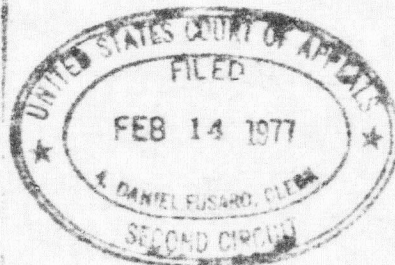
-against-

J.W. PATTERSON, JOSEPH W. PERRIN and ROBERT E.
McCLAY, individually and in their capacities
as Deputy Superintendents of Eastern New
York Correctional Facility and Attica
Correctional Facility, respectively,
BENJAMIN WARD, in his capacity as New York
Commissioner of Corrections, PETER PREISER,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of New York (Stewart, J.)

ANSWERING BRIEF FOR PLAINTIFFS-APPELLANTS



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ANSWERING BRIEF FOR PLAINTIFFS-APPELLANTS

Preliminary Statement

This brief is submitted in answer to the appeal
by defendants from a Judgement and Order by the Honorable
Charles E. Stewart of the United States District Court for
the Southern District of New York, filed on October 12,
1976. Defendants appeal from said Judgment and Order insofar
as it mandates that defendants afford inmates written notice

of charges twenty-four hours prior to Adjustment Committee hearings in cases involving keeplock. Plaintiffs have cross-appealed from the Judgment and Order of Judge Stewart insofar as it denies damages to plaintiffs and expunction from plaintiffs' prison records of all reference to certain alleged misbehavior and subsequent disciplinary action taken by defendants with respect thereto.*

Counter-Statement of
Issues Presented for Review

1. Is keeplock a substantial deprivation of a state-created liberty interest such that procedural safeguards must be afforded an inmate before such a deprivation is imposed?

2. If keeplock is a substantial deprivation, did the district court err in holding that the Due Process Clause of the United States Constitution requires written notice of the charges to an inmate at least twenty-four hours prior to an Adjustment Committee hearing where keeplock for up to fourteen days may be imposed?

Statement of the Case

A more complete rendition of the course of the proceedings below, the decision of the district court, and

*The Court is respectfully referred to the Brief of plaintiffs-appellants, filed on January 31, 1977, which sets forth in detail the arguments of plaintiffs-appellants with respect to these issues presented for review.

the relevant facts is contained in the Brief of plaintiffs-appellants filed with this Court on January 31, 1977. For purposes of answering the appeal of defendants, however, the following summarizes the salient facts and the lower court's decision regarding the "keeplock" issue.

A. The Facts

On June 5, 1973, the plaintiffs (hereinafter "the prisoners") were inmates at Eastern New York Correctional Facility ("Eastern") where they were assigned to the laundry room (A-15-16*). On that date a dispute arose in the laundry, which involved a work stoppage by the inmate workers, including the prisoners (A-16).

As a result of the dispute, all of the inmates who were in the laundry, including the prisoners, were confined to their cells ("keeplocked") after the noon count on that day (A-29). None of the prisoners were informed of the reason for the keeplock (A-43, 50-51, 58).

Misbehavior reports were written up on the prisoners by certain corrections officers (A-29) and sent to the Adjustment Committee, a prison panel which reviews

*References to page numbers of the Joint Appendix filed with this Court on January 31, 1977 are preceded by "A-."

allegations of misconduct and can impose sanctions against inmates (7 New York Code of Rules and Regulations §252.5 ("N.Y.C.R.R."); A-190). On June 7, 1973, an Adjustment Committee panel met and the prisoners were brought before it (A-16-17). None of the prisoners were provided with written or oral notice of their appearance before the Adjustment Committee or a statement of the charges made against them until they were brought before the Adjustment Committee (A-44, 51, 58).

The dispositions by the Adjustment Committee as to the prisoners were identical: Seven days keeplock and a re-interview before the Adjustment Committee at the end of that period, plus a recommendation of a change in program (A-16-18). None of the prisoners were re-interviewed (A-17). The prisoners remained in keeplock for more than seven days, never receiving notice of what was to happen to them or how long the restrictive confinement would continue (A-46, Tr.* 87-89, 134).

In keeplock the prisoners were confined to their cells for 23 to 24 hours per day (A-32). They were denied access to the general prison population and the normal routine of the institution (A-31-32), had very limited access to showers and physical activity (A-31), were not

*"Tr." represents references to pages of the transcript of the trial below which are not included in the Joint Appendix.

allowed to work at their prison jobs or earn wages, and could not engage in any educational or other programs offered by the institution (A-32).

Approximately 15 to 20 days after being keeplocked, the prisoners were taken from keeplock and transferred to maximum security institutions (A-16; Tr. 33, 89, 135).

B. The Proceedings Below

The prisoners commenced a civil rights action on September 19, 1973. The named defendants in the third amended complaint* are all present or former employees of the New York State Department of Corrections, and include the Superintendent and Deputy Superintendents of Eastern in June of 1973 and the present and a former Commissioner of Corrections. The complaint claimed, inter alia, deprivations of the prisoners' due process rights in being keeplocked for over two weeks without adequate hearings and sought injunctive relief barring such conduct in the future as well as damages and other and further relief.

Trial of this action was held on May 24-26, 1976 before the Honorable Charles E. Stewart, sitting without a

*Included in the Appendix at A-5.

jury. The district court issued its opinion on September 13, 1976 and filed a Final Judgment and Order on October 12, 1976, which dismissed all of the prisoners' claims except the first claim for relief involving keeplock, as to which declaratory and injunctive relief were granted.

Judge Stewart held that the confinement of an inmate to his cell is a substantial deprivation of a state-created liberty interest (A-27). Such confinement therefore cannot be imposed without a hearing which comports with the Due Process Clause of the Fourteenth Amendment. The court further held that the Adjustment Committee proceedings were constitutionally insufficient in failing to provide any advance notice of the charges to the prisoners and in allowing an officer with prior involvement in the laundry incident to sit on the panel conducting the hearings. Judge Stewart then ordered that in future Adjustment Committee hearings involving keeplock, written notification of the charges must be given the inmate at least twenty-four hours before the hearing and no person with direct, personal involvement in the incident giving rise to the charges may be a member of the Adjustment Committee panel conducting the hearing.

ARGUMENT

Introduction

According to defendants' brief, they are appealing only that part of the lower court's Judgment which ordered

that in the future "inmates be afforded written notice of charges twenty-four hours in advance of adjustment committee proceedings, in all cases involving keeplock." (Brief of Defendants-Appellants filed January 31, 1977, at 1 (hereinafter "Defendants' Brief"); see id. at 2, 14.) Defendants' Brief does not raise any issue as to whether the hearings afforded the prisoners by the defendants (hereinafter the "Corrections Officials") violated the prisoners' constitutional rights* or whether the court's order respecting the need in the future for an impartial Adjustment Committee is proper. The sole issue raised by the Corrections Officials' appeal is the necessity for providing advance written notice before Adjustment Committee hearings are held in situations where keeplock is a possible sanction.** The determination of this issue turns upon an analysis of the nature of this condition of confinement and whether such a punishment constitutes a deprivation of a state-created liberty interest sufficient to mandate providing due process procedural safeguards prior to its imposition. See, e.g., Wolff v. McDonnell, 418 U.S. 539 (1974).

*Defendants' Brief, while limiting the issues on appeal, confuses that issue by arguing that the district court erred in holding that the procedures afforded the prisoners violated their constitutional rights. See Defendants' Brief at 20-22.

**Since the Adjustment Committee is granted the power by the rules of the Department of Corrections to impose keeplock for up to fourteen days (7 N.Y.C.R.R. §252.3), every such hearing potentially "involves" keeplock and, therefore, the decision to bring an inmate before the Committee necessitates the provision of 24 hours advance written notice. But see Defendants' Brief, footnote at 24.

I

KEELOCK IS A SUBSTANTIAL
DEPRIVATION OF A STATE-CREATED
INTEREST

A. Keeplock is a Substantial Deprivation

The court below made the following findings of fact with respect to the keeplock punishment imposed on the prisoners.

15. When keeplocked, [the prisoners] were confined to their cells. They had the use of their personal property. . . . They had very limited access to showers and physical activity. . . . They could not participate in the normal routine of the prison, work at their assigned jobs, receive wages for such work, or take part in educational offerings. . . . They spent from 23 to 24 hours per day in their cells. They were denied contact with other inmates during their confinement. [A-31-32]

The district court then held that these sanctions constituted "substantial deprivations" within the meaning of this Court's decision in Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (en banc), cert. denied, 404 U.S. 1049 (1972), and cited three decisions in support of its conclusion: United States ex rel. Larkins v. Oswald, 510 F.2d 583 (2d Cir. 1975), Gilliard v. Oswald, 73 Civ. 249 (N.D.N.Y., July 22, 1976), and United States ex rel. Walker v. Mancusi, 338 F. Supp. 311 (W.D.N.Y. 1971), aff'd, 467 F.2d 51 (2d Cir. 1972). An analysis of those decisions establishes that the district court's holding is a logical extension of the reasoning employed in these and other cases and should be upheld by this Court.

In United States ex rel. Larkins v. Oswald, supra, this Court affirmed a jury award of damages in a civil rights action brought by a prisoner who was given "[c]onfinement in HBZ [a special housing unit] for 7 days with loss of yard and recreation" by an Adjustment Committee for possession of "inflammatory and revolutionary papers," but who was actually confined 12 days. Although the main thrust of the Court's decision centered on the impermissible punishment of plaintiff for exercising his First Amendment rights, the Court made the following observations concerning the procedures afforded by the institution:

Thus, if Wolff v. McDonnell, supra, were to be applied retroactively there would be no question whatsoever that summary judgment would be proper since nothing indicates that there was any written notice of the charges to Larkins or that there were any findings by the Adjustment Committee or reasons stated in connection witherewith. [510 F.2d at 586-87]

Larkins was locked in his cell in a special housing unit 24 hours a day for a period of 12 days, being allowed out of his cell for "two or three showers, one attorney visit and two visits to the prison hospital. . . ." Id. at 589. The district court in the instant case obviously compared the deprivations occasioned by Larkins' confinement, which according to this Court were unquestionably substantial, with the similar restrictions imposed upon the prisoners in the case at bar and concluded that Larkins indicated that keeplock was

also a grievous loss of the prisoners' admittedly limited freedom. See Cunningham v. Ward, 76-2068 (2d Cir., December 1, 1976), slip op. at 733-35.

The district court's conclusion is buttressed by the decision in United States ex rel. Walker v. Mancusi, 338 F. Supp. 311 (W.D.N.Y. 1971), aff'd, 467 F.2d 51 (2d Cir. 1972).^{*} In that case the plaintiffs were prisoners who had been transferred to administrative segregation without any Adjustment Committee hearings. Although the opinion is unclear as to whether their personal belongings were transferred with them to their new cells, the conditions of confinement were remarkably similar to the keeplock imposed upon the prisoners in the case at bar:

^{*}The Corrections Officials assert in their brief on appeal that the court below erroneously relied on the opinion of the Second Circuit in Walker. (Defendants' Brief at 18-19.) The lower court, however, cited the opinion of the district court in Walker, which analyzed the nature of the deprivations there involved and found them to be substantial. The district court in Walker further ordered that, in light of such substantial deprivations, certain due process safeguards had to be afforded those inmates, including written notice of charges, information regarding the evidence against them, reasonable opportunity to explain their actions, written findings of fact and notice of the right to appeal the decision. The Second Circuit's opinion in Walker affirmed the district court without discussing the nature of the deprivations imposed. It is a blatant and somewhat absurd misrepresentation for the Corrections Officials to maintain that this Court's affirmance of due process procedures ordered by the district court in Walker, which were held to be mandated by Sostre v. McGinnis, supra, owing to the substantial deprivations suffered by the Walker inmates, supports defendants' position that the deprivations in the case at bar were not substantial.

In contrast to the prisoners in general population, the inmates in A Block, 6 Company, are locked in their cells in excess of twenty-three hours a day and are allowed only a brief period of exercise in the yard when prisoners from other areas are not there. They eat in their cells rather than in the mess hall, and they do not work in the jobs they held prior to September 9, although as of November they receive the minimum pay of twenty cents an hour paid to inmates unassigned to jobs through no fault of their own.

Conditions in A Block, 6 Company, are not, however, as restrictive as those in Housing Block Z [the principal segregation area]. The inmates of A Block, 6 Company, may have newspapers, magazines, and the use of radio ear-phones, all of which are unavailable to prisoners in Housing Block Z. They have commissary privileges and may receive packages from the outside. The exercise facility in Housing Block Z is more limited than that available to inmates of A Block, 6 Company. Finally, a man in Housing Block Z may suffer a loss of good time, while no such loss attaches to confinement in A Block, 6 Company. [338 F. Supp. at 313.]

The district court in Walker then concluded that while these conditions did not constitute cruel and unusual punishment in contravention of the Eighth Amendment, they did involve "a harsh reduction of the privileges typically afforded inmates of the general population," id. at 314, quoting Carter v. McGinnis, 320 F. Supp. 1092, 1093 n. 1 (W.D.N.Y. 1971), and called for due process safeguards prior to their imposition. 338 F. Supp. at 314. This Court affirmed this conclusion. 467 F.2d at 53-54.

Judge Stewart undoubtedly found the conditions attending the keeplock imposed in the case at bar sufficiently similar to the special confinement in Walker to deem that case controlling. Indeed, the prisoners keeplocked in this case had even less privileges than the inmates in Walker, since the prisoners received no pay, were not allowed to receive packages and were denied any recreation for the first week of their keeplock (A-31-32; Tr. 32, 38, 78, 108, 132, 136).

Finally, the district court relied upon Gilliard v. Oswald, 73 Civ. 249 (N.D.N.Y., July 27, 1976), a recent decision holding, inter alia, that confinement of inmates in a special housing unit constituted "substantial deprivations." Slip Op. at 6.* The confinement in the special housing unit was substantially similar to the keeplock imposed upon the prisoners in the case at bar. See Slip Op. at 3-4.

The district court's conclusion that keeplock is a substantial deprivation is in accord with the cases cited above and with other decisions which have recognized that "any further restraints or deprivations in excess of that inherent in the sentence and in the normal structure of prison life should be subject to judicial scrutiny." Jackson v. Godwin, 400 F.2d 529, 535 (5th Cir. 1968).

The prisoners in the instant case do not contend that the above-described deprivations could be considered

*A copy of the slip opinion is included in the Addendum to this brief.

substantial outside the prison context; but they do assert that such restraints are substantial when imposed on inmates for whom the term freedom has a radically different meaning than for citizens on the outside. For prisoners, their only "freedom" consists of the society of their fellow prisoners and the few meager privileges they are afforded. Accordingly, any punishment which entails more restrictive confinement and the loss of most of those privileges must be considered "substantial" under the circumstances. See, e.g., United States ex rel. Robinson v. Mancusi, 340 F. Supp. 662, 663 (W.D.N.Y. 1972); United States ex rel. Walker v. Mancusi, supra. See also Diamond v. Thompson, 364 F. Supp. 659, 664 (M.D. Ala. 1973) (administrative segregation is a "substantial and grievous loss to prisoners," since while so confined they cannot work or earn money, their freedom to move about is "severely restricted," and their confinement in close quarters is continuous). Keeplock appears to differ from segregation principally in the physical location of the cells; the restrictions are otherwise almost identical and the loss suffered by the inmate is equivalent. See Cunningham v. Ward, supra, slip op. at 733.

The cases cited by the Corrections Officials (Defendants' Brief at 16-17), when analyzed, do not support their

contention that keeplock is an insubstantial restriction. Milburn v. Fogg, 393 F. Supp. 1164 (S.D.N.Y. 1975), Schumate v. People of the State of New York, 373 F. Supp. 1166 (S.D.N.Y. 1974), Robinson v. Barola, 73 Civ. 787 (S.D.N.Y. 1973), Sczerbaty v. Oswald, 341 F. Supp. 571 (S.D.N.Y. 1972), and Esser v. Jeffes, 416 F. Supp. 719 (M.D. Pa. 1975), were all instituted as pro se actions where the constitutional issues were inadequately presented, and therefore reliance on these decisions as well-reasoned expositions of the law is inadvisable. See Ault v. Holmes, 369 F. Supp. 288, 292 (W.D. Ky. 1973), modified, 506 F.2d 288 (6th Cir. 1974).

In Milburn Judge McMahon dismissed plaintiffs' claim even though it appears from the opinion that defendants violated their own regulations by failing to give the plaintiff an Adjustment Committee hearing for five days (see 7 N.Y.C.R.R. §252.3(f)); and in Schumate, the ambiguity of the pro se complaint was such that it is difficult to understand just what the court was holding. In Sczerbaty, the plaintiff claimed that keeplock constituted cruel and unusual punishment; whether procedural safeguards were required prior to the imposition of keeplock was not at issue.

Esser v. Jeffes involved a claimed loss of privileges, such as movies and gym, for fifteen days, as to which the court held plaintiff was not allowed to call witnesses, confront accusers, or be given advance written notice of the hearing held with respect to the minor misconduct

charged. 416 F. Supp. at 720. The issue of keeplock as a major change in the condition of confinement was not at issue and was never addressed by the court. Finally, in Landman v. Royster, supra, the court did not hold that keeplock for less than 10 days was not a substantial deprivation, but merely stated that defendants could comport with due process by granting the inmates impartial hearings and advance oral notice. 333 F. Supp. at 654. The court in Landman, however, thought "padlocking" for less than ten days a serious enough deprivation to necessitate allowing the accused inmate to "cross-examine the complaining officer and to present testimony in defense." Id.

B. Keeplock is a Deprivation of a State-Created Liberty Interest

The court below concluded that the prisoners' keeplock cause of action was not precluded by the recent decisions of the Supreme Court in Montanye v. Haymes, ___ U.S. ___, 49 L. Ed.2d 466 (1976), and Meachum v. Fano, ___ U.S. ___, 49 L. Ed.2d 451 (1976), because New York State law conditioned confinement of an inmate to his or her cell on the following of "certain procedures" (A-27). This conclusion is compelled by the Supreme Court's reasoning in Wolff as well as the above-cited cases.

In Meachum v. Fano, supra, Justice White held that no matter how substantial the deprivations occasioned by a transfer of inmates to more restrictive institutions, the inmates had no

cognizable liberty interest in remaining at any particular institution sufficient to trigger the procedural protections of the Due Process Clause of the Fourteenth Amendment. 49 L. Ed.2d at 460-61. In distinguishing Wolff v. McDonnell, supra, however, he acknowledged that the State can grant a liberty interest to an inmate which it cannot remove absent adequate procedural safeguards:

The liberty interest protected in Wolff had its roots in state law, and the minimum procedures appropriate under the circumstances were held required by the Due Process Clause "to insure that the state-created right is not arbitrarily abrogated." [Id. at 460.]

See also Morrissey v. Brewer, 408 U.S. 471, 482 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970). In Montanye v. Haymes, supra, the Court held that there was no basis in New York law for invoking the protections of the Due Process Clause because transfers were not "among the punishments which may be imposed only after a prison disciplinary hearing." 49 L. Ed.2d at 472.

Keeplock, of course, is among the sanctions which the Adjustment Committee is authorized to mete out to inmates found guilty of misbehavior. 7 N.Y.C.R.R. §§252.3(f), 252.5(e)(2). And it is listed in the inmate's rule book as a punishment which can be imposed after such a hearing (Plfs. Exh. 55*). Accordingly, unlike the inmates transferred in

*"Plfs. Exh." represents references to exhibits not included in the Joint Appendix.

Haymes and Fano, the prisoners in the instant action had a "justifiable expectation that [they] would not be [keeplocked] unless found guilty of misconduct." Montanye v. Haymes, supra, 49 L. Ed.2d at 472. Once the State creates such a liberty interest, it cannot allow it to be "arbitrarily abrogated," Wolff v. McDonnell, supra, 418 U.S. at 557, by failing to provide adequate hearings, since "the determination of whether [misbehavior] has occurred becomes critical" Id at 558.

A federal district court recently concluded that inmates transferred from general population to administrative segregation were entitled to procedural safeguards because they had a reasonable expectation, rooted in regulations promulgated by the State Department of Corrections, that such actions would not be taken absent particular conditions and specified procedures. Four Unnamed Plaintiffs v. Hall, Civil Action 76-4322-T (D. Mass., December 9, 1976).^{*} The court rejected defendants' contention that state regulations never create substantive rights protected by the Due Process Clause, and held that the Massachusetts regulations created reasonable expectations which gave rise to liberties protected by due process under the reasoning employed by the Supreme Court in Montanye v. Haymes and related cases.

^{*}A copy of the slip opinion in this case is included in the Addendum to this Brief.

The keeplock of the prisoners in the instant action was properly held to be a substantial deprivation of a state-created right which could not be abrogated absent procedural safeguards. Accordingly, the only remaining issue is whether formal written notice of the charges must now be provided an inmate twenty-four hours prior to Adjustment Committee hearings where such a sanction can be imposed.

II

THE COURT CORRECTLY HELD
THAT DUE PROCESS REQUIRES
TWENTY-FOUR HOURS ADVANCE
WRITTEN NOTICE PRIOR TO
ADJUSTMENT COMMITTEE HEARINGS

A. Twenty-Four Hours Advance Written
Notice is Constitutionally Required

In Wolff v. McDonnell, supra, 418 U.S. 539 (1974), the Supreme Court stated that "'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by government action.'" Id. at 560, quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). The Court then held that advance written notice of the charges at least 24 hours in advance of the disciplinary hearing is a basic element of due process which must be provided an inmate faced with loss of good time or solitary confinement in order to inform him of the charges and enable him to "marshall the facts and prepare a defense." 418 U.S. at 564. The Court left open what procedures were mandated by due process when lesser punishments, such as a loss of privileges, are at issue. Id. at 571 n.19.

In Crooks v. Warne, 516 F.2d 837 (2d Cir. 1975), this Court agreed with Judge Breiant that an inmate confined to her cell for 23 hours a day for seven-day periods by an Adjustment Committee was denied her right to due process because she had not received notice of the charges to be considered by the Committee. The Court reasoned:

[D]ue process requires some additions to the State's procedures in cases before an adjustment committee. The extent to which procedural requirements clearly applicable to superintendent's proceedings should be applied to hearings before an adjustment committee depends upon whether the inmate is being charged with specified acts, or the question at issue is whether she presents such a danger to herself, to other prisoners or to correction officers that she should not be returned to the general population. . . . In every case involving disciplinary proceedings governed by Wolff she should receive written notice of the charges or concerns of the committee, including any charge of misconduct, ordinarily at least 24 hours before the hearing; in appropriate cases she should be allowed to call witnesses or present written evidence; in every case she should receive promptly after the hearing a statement of the reasons for any action taken. (Id. at 839)

See also Powell v. Ward, 392 F. Supp. 628 (S.D.N.Y. 1975), aff'd as modified, 542 F.2d 101 (2d Cir. 1976).

In their Brief on Appeal, the Corrections Officials argue that the "formalization" of the Adjustment Committee procedures was totally unwarranted by the facts of this case. Defendants' Brief at 23.* The Corrections Officials cannot

*The Corrections Officials also argue that the district court erred in holding that the procedures afforded the prisoners were constitutionally inadequate (Defendants' Brief at 20), and assert that the lower court improperly applied Wolff v. McDonnell retroactively in ordering the Corrections Officials to provide twenty-four hours advance written notice of charges, id. at 22. Since the Corrections Officials have not put the district court's ruling as to their past conduct in issue on this appeal, see p. 7, supra, the first argument is irrelevant. Nevertheless, the procedures accorded the prisoners were constitutionally inadequate, as is demonstrated infra. As to the claimed improper retroactive application of Wolff, the lower court did not scrutinize

(footnote cont'd on next page)

understand what salutary effect such notice would have, asserting that the prisoners have no need for such a procedure; bemoan the loss in flexibility in the two procedures now afforded inmates -- the Superintendent's proceeding and the Adjustment Committee hearing -- by the notice requirement imposed by the lower court; and, finally, seek an "accommodation" of the prisoners' and the Corrections Officials' interests by requiring the Adjustment Committee to render the required notice in proceedings involving more than seven days of keeplock. The Corrections Officials' contentions have no merit and should be rejected by this Court.

Contrary to the Corrections Officials' assertions, the salutary effect of advance notice has been a fundamental

(footnote cont'd from preceding page)

the Adjustment Committee proceedings by reference to the written notice requirement set out in Wolff. It merely held that the Corrections Officials were constitutionally compelled to afford the prisoners some advance notice of the charges (A-34); the form of the notice, or the time when it had to be rendered, were not set forth by the lower court (id.). Further, it is difficult to understand how the court could have applied Wolff retroactively to a requirement concerning procedures to be followed in futuro. The Corrections Officials' argument that the case at bar did not present a case or controversy as to procedures subsequent to 1973 is refuted (1) by the relief sought by the prisoners and (2) by the Corrections Officials' failure to provide 24 hours advance written notice to inmates, a requirement held by the lower court to be compelled by the constitution, until after the decision was filed in the case at bar. Surely the Corrections Officials cannot validly argue that the lower court, when presented with a case or controversy as to the minimum procedures necessary before keeplock is imposed, is without power to declare what the constitution requires.

tenet of the concept of a fair hearing. Courts and commentators have repeatedly stressed the importance of allowing a person exposed to potential "grievous loss," Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, Jr., concurring), to have advance notice of the charges made against him so that he can marshall the facts and prepare a defense. See, e.g., Wolff v. McDonnell, supra, 418 U.S. at 564; Morrissey v. Brewer, 408 U.S. 471 (1972); Goldberg v. Kelley, 397 U.S. 254 (1970); In re Gault, 387 U.S. 1 (1967); Daigle v. Helgemoe, 399 F. Supp. 416 (D.N.H. 1975). See generally Friendly, Some Kind of a Hearing, 123 U. Pa. L. Rev. 1267, 1280-81 and n.76 (1975); Note, Judicial Intervention in Prison Discipline, 63 J. Crim. Law. 200, 204-05 (1968).

Advance notice of charges has many salutary effects: It compels the charging officer to be more specific as to the misconduct with which the inmate is charged; it serves to narrow the inquiry at the hearing to the misconduct alleged; it informs the inmate of what he has allegedly done, so that he can prepare a rebuttal, if he so chooses, to the specific charge set forth based on whatever facts he can muster given the limited time frame and the lack of an opportunity to interview or call witnesses; and it aids the finder of fact to reach an informed decision. See, e.g., Note, Decency and Fairness: An Emerging Judicial Role in Prison Reform, 57 U. Va. L. Rev. 841, 868, 873 (1971); cf. In re

Gault, supra. The notice provision also provides a degree of fairness to the proceedings so that an inmate is not summarily brought before a three-member panel and required on the spot to explain the vague charges set forth in a misbehavior report which he has never seen. A proceeding which includes advance notice could, at least in some instances, serve to dispel the resentment of inmates at being "tried" before what at least one prisoner has described as a "kangaroo court." (Tr. 26) See, e.g., Daigle v. Helgemoe, supra., 399 F. Supp. at 419-20.

In the case at bar, the Corrections Officials assert that advance notice of the charges would not have benefited the prisoners, since there was no evidence presented either that they did not understand the charges or that their "cases" were not decided on the "merits." In effect, the Corrections Officials argue that the prisoners were required at trial to speculate on what would have happened but for the Corrections Officials' failure to afford adequate notice, and ignore the demonstrated hardship to the prisoners from the summary action taken against them.

The credible testimony at trial established that there were varying degrees of involvement by the inmates in the laundry dispute (Tr. 162-63). One prisoner was charged with being a leader of the disturbance, even though he asserted at the Adjustment Committee hearing that he was a calming influence (compare A-118 with A-115); and another

prisoner claimed that the dispute was the fault of the corrections officers assigned to the laundry (A-52, 114). Advance notice might have allowed these prisoners to present a rebuttal to these charges which would have been more specific and detailed. Moreover, notice of the charges would have informed the inmates that hearings were to be conducted which could lead to serious sanctions, such as keeplock for a substantial period of time, confinement in a special housing unit, an eventual change in program, and possibly transfer to a more restrictive institution. (See 7 N.Y.C.R.R. §252.5(e); A-109, 111-113) Notice of such a hearing and the possible sanctions involved might have caused the inmates to attempt preparation of a convincing explanation for the incident and reasons for not being given particular sanctions. The bald assertion by the Corrections Officials that advance notice could not serve any useful purpose cannot be sustained under the circumstances surrounding the case at bar.

The claim that Judge Stewart's decision destroys the so-called "flexibility" of the "two-tiered disciplinary system" in New York's correctional institutions, Defendants' Brief at 25, is equally meritless. The Adjustment Committee has the power to mete out punishment which is comparative in severity, if not longevity, to the sanctions at the disposal

of the Superintendent's proceeding officer.* If the Adjustment Committee were truly one aspect of a two-tiered disciplinary system, its sanctions would not include the substantial punishments which were given to the prisoners in the instant decision, but would be limited to the power to impose minor penalties, such as loss of privileges. Further, the claimed remedial and guidance purposes of the Adjustment Committee proceeding, if in fact an integral part of the hearing procedure, might validly distinguish the two procedures and lend credence to the Corrections Officials' contentions as to the desirability of maintaining flexibility. The evidence in the case at bar, however, as well as many other cases challenging Adjustment Committee action** demonstrate that the Department of Correction rules*** concerning the purposes of these proceedings are totally ignored by the Adjustment Committee hearing panels. The uncontradicted evidence in this case established that the Adjustment Committee panel was concerned only with certain bare facts: Whether the particular inmate was present during the incident in question, as charged in the misbehavior reports. (A-46, 52-53, 59; Plfs. Exhs. 22-24, 26-35, 37).

*See Point I, supra, at pp. 8 to 15. See also Crooks v. Warne, supra, 516 F.2d 837 (2d Cir. 1975); U.S. ex rel. Larkins v. Oswald, 510 F.2d 583 (2d Cir. 1975); Powell v. Ward, supra, 392 F. Supp. 628 (S.D.N.Y. 1975).

**See Brief for Plaintiffs-Appellants, footnote at 20-21. See also Crooks v. Warne, supra; U.S. ex rel. Larkins v. Oswald, 510 F.2d 583 (2d Cir. 1975).

***See, e.g., 7 N.Y.C.R.R. §§252.2(b) and (d), 252.4(c) and 252.5(c).

The "hearings" given by the Adjustment Committee were substantially similar for all the prisoners (A-44-46, 52-54, 59-60). After they were brought before the panel and either read or shown the misbehavior reports containing the charges brought against them (A-45-46, 52, 59), they were then asked for their explanation of the charges (A-46, 52-53, 59). There was never any attempt to ascertain the causes of the disturbance (Tr. 25-29, 72-77, 130-31), to counsel the inmates as to the permissible method for presenting grievances to the prison authorities or even to tell them why their conduct was unacceptable. Each hearing was cursory, and the result as to all the prisoners, and, indeed, for every inmate present* in the laundry who appeared before the Adjustment Committee was identical: Keeplock for seven days with a "reivew" (Tr. 28; A-53, 59; Plfs. Exhs. 22-37). There was no attempt at guidance, no attempt to comply with the stated purposes of these proceedings. See 7 N.Y.C.R.R. §§252.4, 252.5(a), 252.2(d); Brief for Plaintiffs-Appellants, footnote at 20-21. It is indeed difficult to determine what remedial purposes the proceedings in this case had or could have for an inmate, or why the requirement of advance written notice could have a deleterious effect on Adjustment Committee "flexibility."

*Ane even for one inmate not present in the laundry at the time of the dispute (see Plfs. Exh. 22).

Nevertheless, the Corrections Officials claim that Judge Stewart's order has necessitated the implementation of a burdensome, time-consuming "dual interview system." Defendants' Brief, footnote at 24. The procedure implemented, however, is burdensome not because of the lower court's order, but because of the recalcitrance of the Department of Corrections. Instead of simply providing advance written notice to inmates who have been scheduled for Adjustment Committee hearings because of misbehavior reports,* the Department of Corrections has chosen to interview the inmates twice if it "appears" after the first interview that keeplock "may be appropriate." (Id.) If the two interviews are conducted by the same Adjustment Committee panel, the beneficial effects of the advance notice requirement could be lost by holding

*See 7 N.Y.C.R.R. §252.3(b). At another point in their brief, the Corrections Officials claim that the practical impact of the rule is to require them "to write down a simple charge on paper and then delay an equally simple hearing for twenty-four hours." This statement belies the claim that the notice requirement is burdensome. Furthermore, under the facts of the case at bar, the Adjustment Committee did not hold hearings until two days after the alleged misbehavior. Since the Adjustment Committee only holds hearings after receiving misbehavior reports, a twenty-four hour notice form could be completed based on the misbehavior report and submitted to the inmate soon after the misbehavior report is filed. The delay, if any, occasioned by this procedure would be minimal. More importantly, however, the statement that only "simple" notice and hearings will result from the order could indicate that the Department of Corrections might only be willing to comply with the form of the lower court's order rather than providing the "meaningful" notice and hearings required under the Due Process Clause. Cf. Escalera v. N.Y. Housing Authority, 425 F.2d 853 (2d Cir.), cert. denied, 400 U.S. 853 (1970); see Daigle v. Helgemoe, supra, 399 F. Supp. at 419.

a "preliminary interview" without notice where the panel determines what punishment may be appropriate, since it can be argued that the full interview will probably have little meaning once the panel has, even preliminarily, prejudged the appropriate sanction for the charges prior to providing notice or a hearing. See Crooks v. Warne, supra, 516 F.2d at 840 ("[I]t would be improper for [the members of the Adjustment Committee] to decide the proper disposition of the case before the hearing."). The notice requirement is only burdensome because the Department of Corrections has chosen to make it so; its construction of an unnecessary, unwieldy mechanism in an attempt to discredit the reasonableness of the lower court's order should not be allowed to influence this Court's review of the notice issue.

Lastly, the Corrections Officials urge that the lower court's order be modified to allow the Adjustment Committee to dispense with advance notice in all proceedings except those where more than seven days keeplock is imposed. Defendants' Brief at 27-28. This alleged "accommodation" would effectively deny the prisoners any benefit from the notice requirement, and, as demonstrated below, is an attempt to render the district court's order a nullity. Under this arrangement, keeplock could be continued indefinitely in seven day installments without advance notice of the charges ever being required. The Department of Corrections, in effect,

wants to revert to the procedures employed under its 1970 rules regarding confinement in special housing. See United States ex rel. Larkins v. Oswald, supra, 510 F.2d at 590. See 7 N.Y.C.R.R. §252.5(e)(3) (1970). See also 7 N.Y.C.R.R. §252.3(f) (1970). This accommodation, moreover, would render the inadequate notice afforded the prisoners in the instant action legitimate in futuro, since the Adjustment Committee gave the prisoners seven days in keeplock with a review. Such an accommodation would only serve to make meaningless any notice requirement. See Crooks v. Warne, supra, 516 F.2d at 838-39 (inmate confined to her cell 23 hours a day with Adjustment Committee hearings to be held weekly entitled to 24 hours advance written notice of charges and statement of reasons for action taken).*

*The Corrections Officials also argue that the district court lacked jurisdiction to include inmates other than the prisoners within the scope of its order. Defendants' Brief at 28; see A-37, 41. Assuming arguendo the validity of this technical argument, compare Crooks v. Warne, supra, 516 F.2d at 839, 840, with Sostre v. McGinnis, supra, 442 F.2d at 203; see also Daigle v. Helgemoe, supra, 399 F. Supp. at 420-21, the effect of restricting the scope of the order to Adjustment Committee procedures involving the prisoners would only be to preclude other inmates denied such procedures from moving for an order holding defendants in contempt. The Corrections Officials cannot seriously argue that the lower court is powerless to decide what minimum procedures the constitution demands in proceedings involving keeplock and, in the interests of judicial economy, stating the obvious -- that these procedures must be accorded in the future to all inmates confined to their cells. See, e.g., Sostre v. McGinnis, supra, 442 F.2d at 198.

B. The Adjustment Committee Procedures
were Constitutionally Inadequate

The Corrections Officials, while appealing only the requirement of advance notice in futuro, argue that the prisoners were afforded due process in their interviews with the Adjustment Committee. Defendants' Brief at 20-22. According to the Corrections Officials, the prisoners received all that they were entitled to under the law prevailing in June of 1973. Id.

The Corrections Officials make no attempt to argue that the court's ruling with respect to the partiality of the Adjustment Committee panel (see A-34) rendered the hearings constitutionally deficient. Indeed, they could not, since case law in 1973 was clear that an impartial tribunal was necessary even for* the informal hearings afforded prisoners. See, e.g., Bowers v. Smith, 353 F. Supp. 1339, 1346 (D. Vt. 1972); Landman v. Royster, 333 F. Supp. 621, 653 (E.D. Va. 1971); Bundy v. Cannon, 328 F. Supp. 165, 172-73 (D. Md. 1971); Kritsky v. McGinnis, 313 F. Supp. 1247, 1250 (N.D.N.Y. 1970); cf. Morrissey v. Brewer, supra, 408 U.S. 471, 486 (1972).

*Or, more accurately, especially for these informal hearings, since the lack of other safeguards makes this requirement imperative if fairness is to be achieved. See Sands v. Wainwright, 357 F. Supp. 1062, 1084 (M.D. Fla. 1973), vacated and remanded on other grounds, 491 F.2d 417 (5th Cir. 1973), cert. denied, 416 U.S. 992 (1974). See also Friendly, Some Kind of a Hearing, 123 U. Pa. L. Rev. 1267, 1279-80 (1975).

The Corrections Officials have focused solely on the notice issue, contending that the district court clearly erred in holding that advance notice was required prior to the Supreme Court's decision in Wolff v. McDonnell, supra, when Sostre v. McGinnis, supra, the seminal decision at that time on prisoners' procedural rights, clearly held that no such requirement existed. Defendants' Brief at 20-22. This argument displays a misconstruction of the Sostre decision.

In that case this Court reversed the district court's order concerning the procedures mandated by due process, stating:

All of the elements of due process recited by the district court are not necessary to the constitutionality of every disciplinary action taken against a prisoner. . . . We do not thereby imply that discipline in New York prisons may be administered arbitrarily or capriciously. We would not lightly condone the absence of such basic safeguards against arbitrariness as adequate notice, an opportunity for the prisoner to reply to charges lodged against him, and a reasonable investigation into the relevant facts -- at least in cases of substantial discipline. [442 F.2d at 203 (emphasis added)]

It is clear from the above that the Court was not setting forth any definitive interpretation as to what minimum procedures must be accorded, but instead left that "decision

. . . for another day through case-by-case development." Id. at 206 (Waterman, J., concurring). See Rhem v. Malcolm, 371 F. Supp. 594, 631 (S.D.N.Y.), modified, 507 F.2d 333 (2d Cir. 1974). And in Nieves v. Oswald, 477 F.2d 1109 (2d Cir. 1973), a decision pre-dating the events at issue in the case at bar, this Court interpreted Sostre as not foreclosing claims that the Constitution compelled more than the minimum requirements set forth in that opinion. Id. at 1113. Accordingly, the question of what procedures are due a prisoner subjected to substantial deprivations was not finally answered in Sostre, which was cautiously written to allow the standards to evolve as the courts' comprehension of the varying interests involved in the prison context developed and a proper balancing of those interests became more apparent. Cf. Wolff v. McDonnell, supra, 418 U.S. at 572; Wolf v. Colorado, 338 U.S. 25, 27 (1949).

Further, the Sostre decision was issued prior to the Supreme Court's opinion in Morrissey v. Brewer, supra, where the Due Process Clause was interpreted to demand advance notice as a minimum requirement in a context similar to the prison setting. See Rhem v. Malcolm, supra, 371 F. Supp. at 631 ("The questions left open by the flexible language of Sostre. . . are answered in [Morrissey and]. . . later cases.").

Several decisions rendered prior to June of 1973 both in this Circuit and elsewhere clearly established that advance notice was necessary in disciplinary proceedings

involving substantial deprivations. See, e.g., Collins v. Hancock, 354 F. Supp. 1253, 1258-59 (D.N.H. 1973); Landman v. Royster, 333 F. Supp. 621, 653, 654 (E.D. Va. 1971); Bundy v. Cannon, 328 F. Supp. 165, 172 (D. Md. 1971); Carothers v. Follette, 314 F. Supp. 1014, 1028 (S.D.N.Y. 1970); Morris v. Travisono, 310 F. Supp. 857, 871-72 (D.R.I. 1970). See also 7 N.Y.C.R.R. §253.3(b) (1970) (advance written notice provided inmate prior to Superintendent's proceeding). See generally Note, The Evolving Right of Due Process at Prison Disciplinary Hearings, 42 Fordham L. Rev. 878, 884-85 (1974), and cases cited therein. The district court found that under the facts of this case, the failure of the Corrections Officials to provide the prisoners with advance notice of some kind violated their Constitutional rights to due process. Given the evolving standards of minimum fairness as set forth in decisions subsequent to Sostre, of which the Corrections Officials are deemed to have had notice, see, e.g., Wood v. Strickland, 420 U.S. 308 (1975), and given the seriousness of the disturbance in the laundry room and the substantial deprivations visited upon the prisoners, the district court correctly concluded that due process mandated some advance notice of the charges. The Corrections Officials' argument that Sostre compels a contrary conclusion should be rejected by this Court.

CONCLUSION

The Judgment below should be affirmed insofar as it holds that the prisoners' constitutional rights to due process were violated and orders that in future Adjustment Committee proceedings involving keeplock an inmate must be afforded written notice of the charges at least twenty-four hours prior to the hearing and that no person with personal involvement in the incident upon which the charges are based may be a member of the panel conducting the hearing.*

Respectfully Submitted,

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*Plaintiffs-Appellants respectfully refer the Court to their Brief on Appeal, filed January 31, 1977, for their challenges to the district court's denial of their claims for monetary and other equitable relief.

ADDENDUM

Gilliard v. Oswald, 73 Civ. 249 (N.D.N.Y., July 27, 1976),
slip opinion July 22, 1976

Four Unnamed Plaintiffs v. Hall, Civil Action 76-4322-T
(D. Mass. December 9 and 13, 1976), slip opinions
December 9 and 13, 1976

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RAYMOND GILLIARD, FRANCIS BLOETH and
JOHN SUGGS,

Plaintiffs

-against-

RUSSELL G. OSWALD, Commissioner of
Correctional Services and J. EDWIN
LaVALLEE, Superintendent of Clinton
Correctional Facility,

Defendants.

FILED *CPV*
JUL 27 1973
AT 00CLOCK M.
J. R. SOULLY, Clerk
73-CV-249

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EDMUND PORT, Judge

MEMORANDUM-DECISION AND ORDER

In this case tried to the court, the plaintiffs, inmates of Clinton Correctional Facility, seek damages for their alleged unconstitutional confinement in special housing units and segregation. The damages alleged in this action, instituted on behalf of the plaintiffs by the Legal Aid Society Prisoners' Rights Project, in contrast to the usual complaint having astronomical ad damnum clauses, see, e.g., Ray v. Rockefeller, 352 F.Supp. 750 (N.D.N.Y. 1973), are

refreshingly realistic. The complaint seeks \$850.00 compensatory damages for plaintiffs Bloeth and Suggs and \$825.00 for plaintiff Gilliard. Punitive damages in the sum of \$340.00 for Bloeth and Suggs and \$330.00 for Gilliard are also demanded, in addition to small sums for specified lost wages.

Upon consideration of the evidence and exhibits and the memoranda and arguments of the parties, I conclude that the plaintiffs are entitled to judgment in their favor and find as follows:

1. Prior to February 15, 1973, plaintiffs Gilliard, Bloeth and Suggs were housed in general population areas at the Clinton Correctional Facility.

2. While confined in general population, plaintiffs were permitted, inter alia, to:

a) participate in various institutional educational, vocational, recreational, exercise and religious services and programs;

b) live in cells furnished with sink, bed, toilet, full sized locker, a desk and a chair;

c) possess their personal property;

d) intermingle with other inmates;

e) leave their cells for substantial periods of time each day;

f) eat their meals in the mess hall; and

g) make purchases from the commissary.

3. As a result of a number of assaults upon inmates by other inmates on February 15, 1973, defendant LaVallee ordered that the Clinton Correctional Facility be completely closed down, and that the entire inmate population be locked in their cells. The defendant LaVallee based his authority for such action upon 7 N.Y.C.R.R. § 251.6(f), which reads:

§251.6(f) The provisions of this section shall not be construed so as to prohibit emergency action by the superintendent of the facility and, if necessary for the safety or security of the facility, all inmates or any segment of the inmates in a facility may, on the order of the person in charge of the facility, be confined in their cells or rooms for the duration of any period in which the safety or security of the facility is in jeopardy. In any such case the superintendent shall immediately notify the commissioner.

4. 7 N.Y.C.R.R. § 251.6(d) provides:

If the officer having charge of an inmate or if any superior officer has reasonable grounds to believe that an inmate's behavior in his cell or room is disruptive or will be disruptive of the order and discipline of the housing unit, or is inconsistent with the best interests of the inmate or of the facility, such fact shall be reported to the superintendent and the superintendent may order confinement in a special housing unit. Any such order shall be in accordance with Part 304 of Chapter VI of the rules and regulations of the department.

5. Plaintiffs were not involved in the assaults of February 15, 1973.

6. For the following few days the prison population remained in their cells 24 hours a day while the entire facility was thoroughly searched.

7. As a result of the search, a large volume of weapons and other items of contraband were discovered. However, no weapons or items of contraband were discovered on plaintiffs' persons or in their cells and none were otherwise attributed to them.

8. Plaintiffs, on or about February 23, 1973, were transferred¹ to Housing Block E which had been converted into a special housing unit from a general population area.

9. While confined to special housing unit E, plaintiffs were deprived of most of the privileges and amenities they had been afforded

in general population. They were:

- a) denied participation in any institutional educational, vocational, recreational or religious services or programs;
- b) permitted to possess only limited items of their personal property;
- c) confined to their cells 23 hours a day;
- d) denied contact with inmates in the general population;
- e) permitted only 1 hour a day exercise in a small enclosed yard;
- f) permitted only one 15 minute period per week to both shower and wash their clothes;
- g) made to eat meals in their cells; and
- h) had no opportunity to work or receive wages.

10. At no time were any of the plaintiffs informed of any specific charges against them or why they were the subject of any investigation, and at no time were they given a hearing at which they could challenge their confinement in E-Block. Moreover, plaintiffs were never informed how long they would have to remain in E-Block.

11. On or about March 12, 1973, without explanation, plaintiffs were transferred to Unit 14, the disciplinary housing unit at Clinton Correctional Facility, normally used for the confinement of inmates found guilty of serious violations of institutional rules.

12. While confined to Unit 14, plaintiffs were:

- a) denied participation in any program or activity which would allow them to have visual contact with any other inmate;
- b) confined to cells furnished with only a metal bed, bedding, and a combination toilet and sink;
- c) denied most of their personal property except limited reading and writing material, a shortened toothbrush, toothpaste and clothing;

- d) subjected to strip searches and tear gassings;
- e) permitted only 1 hour a day exercise in a small yard;
- f) had no opportunity to work or receive wages; and
- g) denied commissary privileges.

13. At no time were any of the plaintiffs informed of any specific charges against them or why they were the subject of any investigation and at no time were they given a hearing at which they could challenge their confinement in Unit 14. Moreover, plaintiffs were never informed how long they would have to remain in Unit 14.

14. Plaintiffs remained in Unit 14 until they were transferred out of the Clinton Correctional Facility. Plaintiff Gilliard was transferred out on March 27, 1973 and plaintiffs Bloeth and Suggs on March 28, 1973.

15. The only notice received by the plaintiffs in connection with their confinement in E-Block or Unit 14 was a copy of Plaintiffs' Exhibit 1. A copy of Plaintiffs' Exhibit 1, addressed individually to each of the plaintiffs from the defendant LaVallee, advised each plaintiff that he was being placed in temporary keeplock status with others until such time as the defendant LaVallee determines "that a change in your status should be made". The notice further advised that the action was being taken "pursuant to 251.6(f) of the Rules and Regulations of the Department of Correctional Services."

16. At the time of their initial keeplock, plaintiffs Gilliard and Suggs were unemployed,² and plaintiff Bloeth was receiving a wage of 25 cents a day as a block porter.

17. No continuing state of emergency existed at the Clinton Correctional Facility from February 23, 1973 to late March 1973 which justified plaintiffs' summary confinement in special housing units.

18. Defendant Oswald was informed and personally aware of the confinement of plaintiffs under the above-stated conditions.

19. Defendants Oswald and LaVallee personally participated in the treatment accorded the plaintiffs herein.

20. The improper conduct herein was not part of a pattern of such behavior by the defendants or other officials. Further, situations giving rise to the necessity for a wholesale keeplock will only occur, hopefully, very rarely. During such periods of emergency, the action of prison officials should not be unduly restricted. Therefore, the imposition and award of punitive damages herein would not serve a salutary purpose.

CONCLUSIONS OF LAW

1. This court has jurisdiction of the subject matter and the parties hereto. 28 U.S.C. § 1343, 42 U.S.C. § 1983.

2. Plaintiffs' confinement in special housing units on and after February 23, 1973 constituted substantial deprivations and they were thus constitutionally entitled to minimal procedural due process.

3. No emergency situation existed at Clinton during plaintiffs' confinement in special housing units on and after February 23, 1973 which justified defendants' failure to afford plaintiffs said minimal procedural due process.

4. Even assuming an emergency existed at Clinton, 7 N.Y.C.R.R. § 251.6(f) did not justify plaintiffs' transfer from their cells in general population to special housing or their continued confinement therein without minimal due process of any kind. They were not given the reasons for such confinement; they were not charged with any violations; they were not afforded even the most informal opportunity for

any denial of wrongdoing or to request a return to general population with its attendant benefits.

5. The disciplinary action taken against the plaintiffs was in violation of the plaintiffs' rights to due process of the law.

6. The plaintiffs have sustained the allegations alleged in their complaint by a fair preponderance of the credible evidence.

7. The plaintiffs have established facts entitling each plaintiff to damages.

8. Plaintiffs are entitled to recover compensatory damages to redress their unconstitutional confinement in special housing units on and after February 23, 1973.

9. Plaintiffs are not entitled to recover punitive damages.

10. Judgment should be entered in favor of the plaintiffs and against the defendants as follows: in favor of the plaintiff Gilliard in the sum of \$715.00; in favor of the plaintiff Bloeth, \$748.25; and in favor of the plaintiff Suggs, \$740.00.

DISCUSSION

The defendants rely on plaintiffs' Exhibit 1 as giving notice to the plaintiffs of their transfer to special housing. In so doing, defendants misconstrue the section relied upon. Assuming an emergency situation, § 251.6(f) merely requires that § 251.6, setting forth the conditions relating to confinement, should not be construed so as to prohibit emergency action by the superintendent. Subsection (f) permits confinement to a cell (keeplock) for the duration of any emergency "in which the safety or security of the facility is in jeopardy." Although the notice referred to placing the plaintiffs in temporary keeplock, they were, in fact, confined to a special housing unit. Such

confinement is distinguished from the keeplock permitted during an emergency. The keeplock during an emergency is in the inmate's own cell. The confinement in a special housing unit is triggered by reasonable grounds on the part of the prison official "to believe that an inmate's behavior in his cell or room is disruptive or will be disruptive of the order and discipline of the housing unit, or is inconsistent with the best interests of the inmate or of the facility". . § 251.6(d). No facts supportive of such behavior on the part of any of the plaintiffs was shown. In any event, the transfer to special housing from general housing pursuant to § 251.6(d) "shall be in accordance with Part 304 of Chapter VI of the rules and regulations of the department", which "[insure] that [plaintiffs'] due process rights would be protected through utilization of procedures prescribed by written Rules that had been published and put into effect by the Department of Correctional Services." U.S. ex rel Walker v. Mancusi, 467 F.2d 51, 52-53 (2 Cir. 1972).

Such procedures were not employed; nor were any other minimal due process procedures.

Reliance on subdivision (f) is further misplaced under the facts herein because, charitably treating the plaintiffs' confinement during the period subsequent to February 23 as keeplock, it extended beyond the period permitted by that subdivision.

JUDGMENT

For the reasons herein, it is

ORDERED, that judgment be entered in favor of the plaintiffs and against the defendants as follows: in favor of the plaintiff Gilliard

in the sum of \$715.00; in favor of the plaintiff Bloeth in the sum of \$748.25; and in favor of the plaintiff Suggs in the sum of \$740.00.

A handwritten signature in cursive script, appearing to read "Edmund R. ...", written over a horizontal line.

Senior United States District Judge

Dated: July 22, 1976
Auburn, New York

FOOTNOTES

¹ Mr. Suggs, who was already in E-Block at that time, testified that once it was declared a special housing unit, many inmates were transferred out and the conditions became substantially more restrictive. (Tr. 49-50).

² Although unemployed, they were receiving unemployed pay of 20 cents a day. Page 4 of letter from Lt. G. Hoy to W. Gard, dated June 8, 1973, contained in defendants' reply dated January 23, 1974 to plaintiffs' request for production of documents.

Dec 9 11 02 AM '76
DISTRICT COURT
DISTRICT OF MASS

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FOUR UNNAMED PLAINTIFFS

V.

CA 76-4322-T

FRANK HALL and
FREDERICK BUTTERWORTH

MEMORANDUM

TAURO, D.J. December 9, 1976

This is an action brought under 42 U.S.C. § 1983 by four anonymous inmates at M.C.I. Walpole arising out of their transfer from the general population cell blocks to segregated cells within that facility. They allege that the transfer violated rights guaranteed to them by the Due Process Clause, the Equal Protection Clause and the constitutional prohibition against cruel and unusual punishment, all applied to the states through the 14th amendment. The defendants are the Commissioner of the Massachusetts Department of Corrections and the Superintendent of M.C.I. Walpole.

This matter came on before the court on plaintiffs' motion for a temporary restraining order

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to require the return of the plaintiffs to general population cells and to forbid their confinement in segregated cells absent prior procedural safeguards. This court denies the request to release the inmates from segregation. Defendants are, however, ordered to give plaintiffs detailed notice of the charges pending against them and to provide a reclassification hearing on those charges, within a reasonable period.

I.

According to an uncontradicted affidavit³ submitted by one of the plaintiffs, he was awakened in the early morning hours of December 3, 1976, in his general population cell block, A-2, and taken from Walpole to M.C.I. Bridgewater. After several hours at that facility, but still on December 3rd, plaintiff was moved back to Walpole. Upon his return, he was placed not in his A-2 cell, but in a segregated unit in Block B-10. The plaintiff asserts that he is subject to severe deprivations accompanying this transfer: confinement to his cell for 23 and one half hours per day, reduction of visitation privileges, denial of social, work and education privileges, and exposure to health hazards resulting from the unsanitary⁴ conditions in B-10. It is uncontradicted that plaintiffs have never been informed as to the charges, if any,

pending against them, and have never been granted⁵
a hearing as to the validity of those charges.

II.

In addressing questions of prisoners' due process rights, this court is mindful of two fundamental yet conflicting concerns. On the one hand, inmates do not forfeit all of their civil liberties as a result of their incarceration. As Justice White noted in Wolff v. McDonnell, 418 U.S. 539 (1974), "There is no iron curtain drawn between the Constitution and the prisons of this country." 418 U.S. at 555-56. At the same time, federal courts have fostered a "hands-off" policy toward the administration of state correctional facilities. Procunier v. Martinez, 416 U.S. 396, 404-05 (1974). It is with cognizance of these competing concerns that this court acts today.

The seminal case in the area of prisoners' due process rights is Wolff v. McDonnell, 418 U.S. 539 (1974). In that case, inmates challenged the process by which they were denied "good-time credits." While noting that prisoners do not have any independent right to good-time, the Court held that Nebraska inmates had a liberty interest in such credits because they were specifically provided for by Nebraska statute. Once classified as a liberty interest, good-time credits could only be diminished in accordance with the Due Process Clause. The Court

engaged in a balancing of institutional and individual interests in determining what process was ultimately due.

In companion cases last spring, Meachum v. Fano, 49 L.Ed. 2d 451 (1976) and Montanye v. Haymes, 49 L.Ed. 2d 466 (1976), the Court elucidated the due process standard suggested in Wolff. Both cases involved § 1983 challenges to inmate interprison transfers and both held that no due process safeguards attached to such transfers because the inmates had no liberty interest in remaining in a particular institution. In determining the lack of a liberty interest, the Court stated in Montanye,

We held in Meachum v. Fano, that no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events. (emphasis added).

49 L.Ed.2d at 471.

It is the existence of a right or justifiable expectation rooted in state law which determines the existence of a liberty interest and dictates when due process safeguards attach to prisoners' claims. This court, therefore, must focus its attention on whether such

a right or expectation exists.

III.

Defendants contend that plaintiffs have no liberty interest affected by their transfer from Block A-2 to Block B-10. The court rejects that contention because plaintiffs have a reasonable expectation, rooted in state law, that they will not be moved from general population cells to segregated cells absent particular conditions and specified procedures. Those circumstances and procedures are set forth in Massachusetts statutes and State Department of Corrections Regulations.

M.G.L. ch. 127, § 39 grants the Commissioner of Corrections the discretion to order the segregation of any inmate "whose continued retention in the general institution population is detrimental to the program of the institution." The statute provides, however, that the segregated prisoner must enjoy a certain quality of confinement including regular meals, furnished cells, visitation, recreation and communication privileges. There is no doubt that this statute creates a reasonable expectation of such rights in Massachusetts inmates. Thus an inmate cannot be confined in segregation under lesser conditions, absent due process procedures. The defendants represented to the court, at oral argument,

that the plaintiffs are being segregated in compliance with § 39 mandated conditions. The court will accept that representation, until contrary evidence is received.

More important to this case, Massachusetts Department of Corrections regulations create a reasonable expectation that no inmate shall be placed into segregation, even in an emergency, unless the institution has commenced, or is about to commence procedures leading up to a hearing on the reason for the inmate's segregation. The hearing is a mandatory step in the Department's procedure for changing an inmate's classification, that is the terms and conditions of his confinement. Those regulations are the Department of Corrections, D.O. 4400.2, Guidelines for Operation of the Reclassification Process--Intrafacility and Interfacility, conceded by all parties to apply to the instant situation.

The relevant procedure is set out in § 4.2a, which is entitled "[p]rocedure when transfer to a higher custody status is being considered." That section specifies a sequence of events which must be followed in order to change an inmate's classification. The first step in that procedure is affording notice of the reasons for the hearing and of the charges being

leveled (§ 4.2a(1)). The second step is the provision of a hearing, three days after the notice, subject to certain requirements set out in parts 6-10. During the course of the § 4.2a procedure, from giving of notice until reclassification is complete, § 4.2a(a) allows interim emergency segregation of the inmate where it is necessary to preserve institutional peace.

Where the Deputy Commissioner for Classification and Treatment of the Superintendent or his designee determines at any time prior to or during this proceeding that there is an immediate threat to the health and safety of the resident or to others, the resident may be placed in an awaiting action status until there is a final decision about a transfer. (emphasis added).

§ 4.2a(2)

The term "proceeding" apparently refers to the reclassification hearing itself.

Defendants argue that § 4.2a(2) empowers them to segregate the plaintiffs before any of the § 4.2a procedures have commenced. While great weight should be afforded to the Department's interpretation of its own regulations, see Belotti v. Baird, 49 L.Ed.2d 844, 853 (1976), the court believes there is a stronger construction of § 4.2a(2) to be derived from its regulatory context. In context, that section seems to provide an emergency remedy available only during an on-going reclassification procedure which has commenced by notice. Furthermore, the practical

consequences of adopting defendants' argument are troublesome. It would authorize plaintiff's indefinite segregation without telling them when they would be afforded their right to notice and a hearing.

Even if one were to concede that § 4.2a(2) permits the Commissioner, in an emergency situation, to segregate an inmate without a prior notice, such a reading does not compel the acceptance of the defendants' position nor does it leave the plaintiffs without a remedy. In order to avoid reading § 4.2a(2) so as to abrogate all the rights extended by the regulatory reclassification procedure, however, the court finds a requirement implicit in that section that notice and a hearing be given within a reasonable period after the emergency segregation is accomplished. Without that inference, § 4.2a(2) is transformed into a license for the Department to hold an inmate in segregation indefinitely, without ever providing notice or a hearing. Under this alternative theory, the plaintiffs may have been legitimately segregated in light of the perceived emergency at Walpole. Notice and a hearing must now be provided within a reasonable period. The court rules it unreasonable to make the inmates wait more than one week. Because they have already been segregated for six days, they must

be given notice by December 10, and a hearing a week later.

Defendants alternatively argue that Department regulations do not create a reasonable expectation rooted in state law, within the meaning of Wolff and its progeny. Defendants claim that Bishop v. Wood, 48 L.Ed.2d 684 (1976) stands for the broad proposition that state regulations never create substantive rights protected by the Due Process Clause. That is both an overstatement and oversimplification of the holding in Bishop. This court holds, under the circumstances of this case, that Massachusetts corrections regulations do ~~not~~ create the kind of expectations which give rise to liberties protected by due process under Montanve and related cases. If inmates cannot rely on the Department's own regulations, what purpose do the regulations serve?

In so holding, the court finds that Bishop is not controlling here. In that case, the plaintiff claimed a property interest, protected by due process, in an expectation of municipal employment derived from a local ordinance. The Court did not hold that such an expectation could never create an expectation protected by due process. Instead, the Court looked for the state court construction of the ordinance.

Finding none, the Court fell back on the interpretation given by the federal district judge, which it characterized as "tenable." At the same time, it was recognized that a contrary holding was suggested by six members of the Supreme Court in Arnett v. Kennedy, 416 U.S. 134 (1974), when interpreting the scope of the property interest conferred by federal regulations. 48 L.Ed.2d at 690, n.8. Here there is no state construction of these correction regulations. In light of that void, the import of Arnett, and the narrow holding of Bishop, this court is free to interpret the scope of these regulations. It holds that they do create a liberty interest in the plaintiffs--certainly a tenable interpretation.

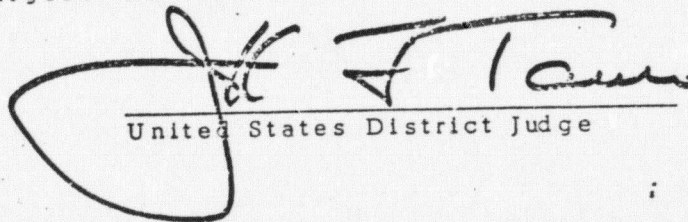
The defendants argue further that the First Circuit opinion in Holtt v. Vitek, 497 F.2d 598 (1st Cir. 1974), indicates that plaintiffs need not be afforded due process here. That case, however, dealt with the wholesale lock-up of ninety percent of a prison's population. The court agrees that Walpole officials probably could put the whole prison population in lock-up, for a reasonable period, in response to an emergency. But they didn't. Instead, a handful of inmates have been singled out for severe deprivations. Holtt does not authorize such action.

Finally, it has been suggested that federal court intervention in this situation is inappropriate out of a concern for comity. Defendants, as well as the Norfolk County District Attorney, assert that any relief granted to plaintiffs by this court will interfere with on-going state administrative and criminal investigations. Defendants refer to the equitable abstention doctrine, evolving from Younger v. Harris, 401 U.S. 37 (1971), by which a federal court should not interfere with an on-going state criminal proceeding. The court does not interpret that doctrine to require federal courts to avoid interference with state criminal or administrative proceedings in the pre-indictment stage, as is the case here. See, Steffel v. Thompson, 415 U.S. 452 (1973). Furthermore, the state and county could give no assurance as to when their investigations would be complete. They were thus requesting a stay of potentially unlimited duration. The court declines to extend such relief.

IV.

The court, therefore, holds that plaintiffs have several reasonable expectations rooted in state law, relating to their emergency transfer to segregated facilities. First, they are entitled to a certain quality of confinement. Second, they should

receive notice and a hearing contemporaneous to the segregation or within a reasonable period thereafter. The court will protect those liberty interests with the provisions of the Due Process Clause. Plaintiffs shall remain in segregated facilities under the conditions specified in M.G.L. ch. 127, § 39. The defendants shall, however, provide plaintiffs with a detailed notice of the charges pending against them, as contemplated by applicable regulations, by 5 p.m. Friday, December 10, 1976. Hearings on those charges shall commence no later than 10 a.m. on the following Friday, December 17, 1976. The defendants shall remain free to amend the notice of charges to reflect developments in their on-going investigations. If the defendants exercise their right to amend, the plaintiffs shall be allowed to request continuances of the hearing to enable them to respond fully to the charges. An order has issued.


United States District Judge

FOOTNOTES

1. This action was originally filed by four unnamed inmates. At the hearing, the Court allowed to intervene by five other unnamed inmates as plaintiffs.
2. At oral argument on this motion, only the due process claim was pressed. It is therefore the focus of the court's attention at this stage of the litigation.
3. It is assumed that the experiences described by the affiant are representative of those of all the plaintiffs.
4. Counsel disagreed as to whether confinement to B-10 constitutes segregation or isolation. State law draws a distinction. See M.G.L. ch. 127, §§ 39, 40. For the moment, the court assumes that plaintiffs are being held in segregation, since the plaintiffs so plead.
5. At oral argument, it was suggested to the court that plaintiffs' change in status was related to charges stemming from a recent rash of killings at Walpole. Without delving into the details of the situation at that institution, the court is satisfied that action was taken against these plaintiffs in response to an administratively perceived emergency threatening the peace at Walpole and the safety of its inmates.

EXHIBIT A



The Commonwealth of Massachusetts

OFFICE OF THE SECRETARY
STATE HOUSE, BOSTON, MASS.

*Rules and Regulations filed in this Office under the provisions of
CHAPTER 30A as amended.*

Filed by DEPARTMENT OF CORRECTION
D.O. 4400.2 Guidelines for the Operation of the Reclassifications Process - Intra-
facility and Interfacility.

Date Filed February 21, 1975

Date Published March 7, 1975

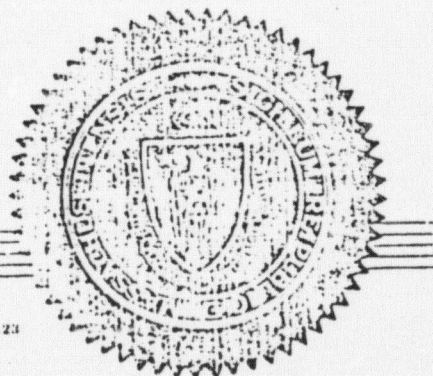
Chapter 233, sec. 75

Printed copies of rules and regulations purporting to be issued by authority of any department, commission, board or Officer of the Commonwealth or any city or town having authority to adopt them, or printed copies of any ordinances or town by-laws, shall be admitted without certification or attestations, but if this genuineness is questioned, the court may require such certifications or attestations thereof as it deems necessary.

Attested as a true copy
PAUL GUZZI

Paul Guzzi

SECRETARY OF THE COMMONWEALTH



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DEPARTMENT OF CORRECTION
COMMONWEALTH OF MASSACHUSETTS

D.O. 4400.2
December, 1974

DEPARTMENT ORDER 4400.2

SUBJECT: Guidelines for the Operation of the Reclassification Process -- Intra-facility
and Interfacility

SECRETARY OF STATE
PUBLIC RECORDS DIVISION
FEB 21 4 19 PM '75

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- Exhibit A -- Covering Letter
- Exhibit B -- Recommendation List
- Exhibit C -- Summary and Recommendation of Classification Proceeding
- Exhibit D -- Individual Recommendation Letter
- Exhibit E -- Notice of Classification Hearing

PROCEDURES IN RECLASSIFICATION

4.1 Preparation for the meeting - When an individual is to be reclassified, members of the committee are notified by the Director of Treatment or case manager of the purpose of the review and the date the case will be considered by the committee. It is then the duty of each staff member to prepare material to be included in the progress report which shall summarize any significant new information and a statement of the individual's progress since the last classification report.

4.2 Procedures for Reclassification Meetings

4.2a Procedure when transfer to a higher custody status is being considered

- 4.2a(1) The department shall give the resident written notice at least three working days in advance of a meeting of a Departmental Classification Committee. This notice shall contain a description of the board and its powers, the procedures to be followed at the meeting, the reason for the meeting, and a listing of the time and place for the meeting. A copy of this notice shall be sent to the Deputy Commissioner for Classification and Treatment, the Superintendent, the case work section, the resident, and, upon his request, his representative. The form of notice to be used by the Department is attached.
- 4.2a(2) Where the Deputy Commissioner for Classification and Treatment or the Superintendent or his designee determines at any time prior to or during this proceeding that there is an immediate threat to the health or safety of the resident or to others, the resident may be placed in an awaiting action status until there is a final decision about a transfer.
- 4.2a(3) The resident shall attend all board meetings where his transfer is being considered. If he refused to, except as stated in section 4.2a(6) attend a meeting, the board shall meet and make recommendations.
- 4.2a(4) A case worker or case manager and where requested by the resident, his representative shall assist him and shall attend all meetings where his transfer is being considered except as stated in section 4.2a(6).

4.2a(5) Prior to a meeting, the resident shall be given an opportunity to discuss with a case manager and his representative all matters which may be relevant to his case. The case manager shall make available to the resident or the resident's representative those portions of his correctional facility file that may be disclosed. In accordance with the provisions of G.L. Chapter 63 Section 7 (Criminal Offender Record Information System) the resident shall be allowed to access to factual criminal record information as defined by the regulations of the Criminal History Systems Board (CHSB). The disclosure of evaluative data shall be in accordance with DOC regulations.

4.2a(6) The chairperson, at his discretion, may permit the resident or his representative to tape record the proceedings. Such tape recordings shall be left at the facility after the hearing and shall remain in the custody of the department. The resident or his representative shall have access to such tapes or reasonable notice to the Department. The Department may have a representative present at the time of such access. Information that the board determines to be confidential shall not be tape recorded.

4.2a(7) If during a meeting, a witness or staff member wishes to present oral or written informant information he shall state to the Board that he wishes to present such information to the Board without the resident or his representative being present. The Board shall then direct the inmate and his representative to leave the meeting while the informant information is presented to the Board. The Board shall also inquire into the reliability of the informant. It shall not be necessary for the Board to interview the informant in person. It may rely on oral or written hearsay testimony. After reviewing the testimony, the Board shall make a determination as to the informant's reliability and the reliability of the information. The Board shall also make a determination as to the extent to which the resident may be informed of the nature of the information presented. The Board shall not hear informant information which has previously been presented to a disciplinary board. In such cases the Board shall limit its inquiry to the results of the disciplinary proceedings.

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4.2a(8) If, during a meeting a witness or staff member wishes to present oral or written information other than informant information which he considers to be confidential, such as a psychiatric report, he shall state to the Board that he wishes to present such information to the Board without the resident or his representative being present. The chairperson shall then direct the resident and his representative to leave the meeting while the information is presented to the Board. In such cases the board shall hear the information without the resident or his representative being present and shall decide whether hearing the information with presence of the resident is likely to cause a severe emotion responses detrimental to his mental health. Unless this finding is made the information shall be presented in the presence of the resident and his representative. If the information is presented without the resident or his representative present the Board will decide the extent to which he can be informed of the information.

4.2a(9) At the meeting, a resident may testify and present written statements of other witnesses. The Board may call any person before it to speak or it may request any person to present written information. The resident may request the Board at its discretion to hear witnesses who wish to testify in his behalf.

4.2a(10) Upon completion of discussions of all relevant information with a resident, the board shall take the matter under advisement.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FOUR UNNAMED PLAINTIFFS

v.

FRANK HALL AND
FREDERICK BUTTERWORTH

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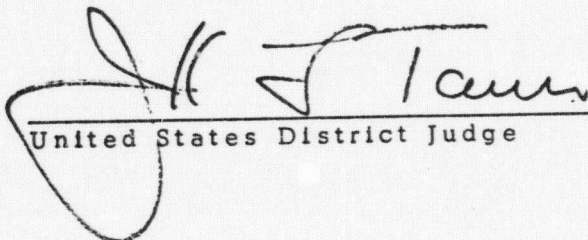
CA 76-4

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SUPPLEMENTAL OPINION

TAURO, D.J. December 13, 1976

Since issuance of this court's opinion on December 9, 1976, the case of MacKinnon, et al. v. Patterson, et al. from the Southern District of New York Civil No. 73-3998 (September 13, 1976) has been called to my attention. Because it has yet to be published by West, I am attaching a copy of the text. Of particular relevance is Judge Stewart's language at page 14.


United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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KHALIEB McKINNON, LAURENCE MINCY,
DAVID WHEELER,

Plaintiffs-Appellants,

-against-

J.W. PATTERSON, JOSEPH W. PERRIN
and ROBERT E. McCLAY, individually
and in their capacities as Deputy
Superintendents of Eastern New
York Correctional Facility and
Attica Correctional Facility,
respectively, BENJAMIN WARD, in
his capacity as New York Comis-
sioner of Corrections, PETER PREISER,

Defendants-Appellees.

Docket No. 76-2153

AFFIDAVIT OF
SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

The undersigned, being duly sworn, deposes and says:
Deponent is not a party to this action, is over 18
years of age and resides at 475 Ocean Avenue, Brooklyn, New
York 11226.

That on the 14th day of February, 1977, deponent served
the annexed copy of the Brief for appellants on Ralph Lewis
McMurry, attorney for defendants in this action, at Two World
Trade Center, New York, New York 10047, the address designated
by said attorney for that purpose, by depositing a true copy of
same enclosed in a postpaid properly addressed wrapper in an
official depository under the exclusive care and custody of the
United States Post Office Department within the State of New York.

Frances A. Warshaw
FRANCES A. WARSHAW

Sworn to before me this
14th day of February, 1977

Pauline C. Cella

Notary Public
PAULINE C. CELLA
Notary Public, State of New York
No. 43-0606985
Qualified in Richmond County
Commission Expires March 30, 1977